

Torts--Negligence--Doctor Held Liable in Damages for Cancerophobia (Ferrara v. Galluchio, 5 N.Y.2d 16 (1958))

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The holding in this case appears to be sound. Since the defendants in this type of prosecution are on trial for tax evasion it would be an undue burden to compel the government to prove not only the crime charged, but also the likely taxable source from which the unreported income came. Once a discrepancy is shown to exist between the taxpayer's increase in net worth and his reported income and the government has negated all possible non-taxable sources, it is not unjust that he be compelled to explain this discrepancy or remain quiet at his peril. However, in clarifying the issue the Court leaves unanswered the question of the limits to which the government must go in negating possible sources of non-taxable income.



TORTS—NEGLIGENCE—DOCTOR HELD LIABLE IN DAMAGES FOR CANCEROPHOBIA.—Plaintiff was burned by X-ray treatments administered by defendants. Approximately two years later she consulted a dermatologist, who treated the burns and advised a checkup every six months because the burned area might become cancerous. The New York Court of Appeals *held* that an award of \$15,000 for the mental anguish of cancerophobia resulting from the dermatologist's advice was proper, as plaintiff's consultation with another doctor was the natural result of defendant's negligence. *Ferrara v. Galluchio*, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958).

Responsibility for the ultimate results of negligent acts is a recognized principle of common law.¹ The doctrine that the law looks to the proximate and not the remote cause was embodied in legal texts by Lord Bacon.² Proximate cause has been defined as that which naturally leads to and might be expected to directly produce the result.³ Common sense has been the primary tool urged by courts for determining the real, true cause of the damage.⁴ Intervention by doctors has been recognized as one of the natural and probable con-

¹ See *Kilduff v. Kalinowski*, 136 Conn. 305, 71 A.2d 593, 595 (1950). "If one is negligent, he is liable for all the injurious consequences that flow from his negligence, until diverted by the intervention of some efficient cause which makes the injury its own. . . ." *Ibid.* See also *Christianson v. Chicago, St. P., M. & O. Ry.*, 67 Minn. 94, 69 N.W. 640, 641 (1896); *Osborne v. Montgomery*, 203 Wis. 223, 234 N.W. 372 (1931).

² "In jure non remota causa, sed proxima, spectatur. . ." See *Proximate and Remote Cause*, 4 AM. L. REV. 201-02 (1870). (All italicized in original.)

³ See *State v. Manchester & Lawrence R.R.*, 52 N.H. 528, 552 (1873); *McGrew v. Stone*, 53 Pa. 436, 442 (1866).

⁴ See *Topsham v. Lisbon*, 65 Me. 449, 462 (1876). See also *Smethurst v. Congregational Church*, 148 Mass. 261, 12 Am. St. Rep. 550, 553-54 (1889); *Hoadley v. Northern Transp. Co.*, 115 Mass. 304, 15 Am. Rep. 106, 109 (1874).

sequences of the negligent act. If such intervention increases the injury, the original wrongdoer is held liable.⁵

In the oft-criticized decision, *Mitchell v. Rochester Ry.*,⁶ the New York Court of Appeals stated its position on the compensability of mental disturbances. Its doctrine that ". . . no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury"⁷ has never been expressly overruled.⁸

An indication of a change in the court's attitude toward the compensable nature of mental disturbances is evidenced in the *Ferrara* case by an extension of the chain of causality.⁹ The original wrongdoer was held liable for the ultimate result of his negligent act, in this case cancerphobia, a purely mental disturbance.¹⁰ That this chain was not considered too tenuous is more surprising since this is exactly the same court that reversed the Appellate Division and the trial court on the issue of causality in *Williams v. State*.¹¹ In the *Williams* case, the court decided that the death of claimant's testator, through fright occasioned by an escaped convict, was not the proximate result of the State's negligence in allowing the convict to escape a few hours previously.¹²

The shift in the court's attitude on recovery for psychic injury is illustrated by a comparison of *Comstock v. Wilson*¹³ with the *Ferrara* case. In the former, the court affirmed the *Mitchell* doctrine that there could be no recovery for psychic injury without some physical impact. This was based on the practical consideration that without some slight impact the psychic injury cannot be anticipated, as well as the danger of fraudulent claims.¹⁴ In the *Ferrara* case the Court states that "freedom from mental disturbance is now a pro-

⁵ *Milks v. McIver*, 264 N.Y. 267, 190 N.E. 487 (1934); *Sauter v. New York Cent. & Hudson R.R.*, 66 N.Y. 50 (1876); *Lyons v. Erie Ry.*, 57 N.Y. 489 (1874).

⁶ 151 N.Y. 107, 45 N.E. 354 (1896).

⁷ *Id.* at 110, 45 N.E. at 355.

⁸ *Sawyer v. Dougherty*, 286 App. Div. 1061, 144 N.Y.S.2d 746 (3d Dep't 1955) (dictum) (mem. opinion).

⁹ "The employment of the dermatologist must be regarded as a natural consequence of the original wrongdoer's tort. . . ." *Ferrara v. Galluchio*, 5 N.Y.2d 16, 20, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 999 (1958).

¹⁰ *Ferrara v. Galluchio*, *supra* note 9. "The case is somewhat novel, of course, in that it appears to be the first case in which a recovery has been allowed against the original wrongdoer for purely mental suffering. . . ." *Ibid.*

¹¹ 308 N.Y. 548, 127 N.E.2d 545 (1955).

¹² *Id.* at 553, 127 N.E.2d at 548. It should be observed however that a public policy concerning rehabilitation of criminal offenders was involved in this case.

¹³ 257 N.Y. 231, 177 N.E. 431 (1931).

¹⁴ *Id.* at 238-39, 177 N.E. at 433.

tected interest in this State.”¹⁵ Recognition is given to the fact that many mental injuries are now capable of clear medical proof.¹⁶

It is interesting to note that the Court does not refer to any of the established exceptions to the *Mitchell* doctrine in granting recovery.¹⁷ Rather, it emphasizes that the cancerphobia was the ultimate result of a natural consequence of the defendant's negligence.¹⁸ It is submitted that recovery could have been allowed under the *Mitchell* rule on a finding that X-rays are sufficiently similar to electrical currents to constitute sufficient physical impact to allow recovery for mental disturbance.¹⁹

The concern of the dissent over “so ready a road to the multiplication of damages” is warranted. However, the standard of medical proof required by the courts in future psychic injury cases will determine the wisdom of the majority's decision. The immediate effect of this case, a further recognition of the compensable nature of mental injuries, is a good one. Fraudulent suitors, however, will continue to be a danger, particularly in view of the apparently scant psychiatric evidence offered at the trial of the *Ferrara* case.²⁰

¹⁵ *Ferrara v. Galluchio*, 5 N.Y.2d 16, 21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 999 (1958).

¹⁶ In the principal case the examining neuropsychiatrist testified that the plaintiff's “. . . thoughts were preoccupied in an obsessional manner and in what we describe as a phobic or fearful manner with certain things that she thought were going to happen to her as a result of the scar and burn which she had on her shoulder.” She was described as very tense, anxious and apprehensive throughout the examination and “. . . showed numerous physical or somatic signs of this anxiety manifested by excessive sweating and coolness of the palms of the hands, by a fine tremor of the outstretched hands and by other signs of what we call general nervousness in terms of her speech, the hesitancy of speech and so forth.” Record, pp. 330-31.

¹⁷ “. . . [N]o recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury.” *Mitchell v. Rochester Ry.*, 151 N.Y. 107, 110, 45 N.E. 354, 355 (1896). For a complete discussion of this rule and its exceptions see McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 1 (1949).

¹⁸ “. . . [L]ater treatment by the dermatologist did not aggravate the physical injury inflicted by the original wrongdoers but, rather, increased only the mental anguish attendant upon such injury. We perceive no sound reason for drawing a distinction between the two situations.” *Ferrara v. Galluchio*, 5 N.Y.2d 16, 20-21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 999 (1958).

¹⁹ See *Buckbee v. Third Ave. R.R.*, 64 App. Div. 360, 364, 72 N.Y.S. 217, 219-20 (2d Dep't 1901), where electrical current satisfied the physical contact requirement.

²⁰ The conclusion drawn from the examination [see note 16 *supra*] of plaintiff's mental state was “. . . that she was suffering from the neuropsychiatric viewpoint from a traumatic neurosis manifested chiefly by depression, that is, by mood depression, by anxiety, by obsessionable thinking about this condition and by what is described as severe cancerphobia, that is, the phobic apprehension that she would ultimately develop cancer in the site of the radiation burn.” Record, p. 332. Only one psychiatrist testified for the plaintiff. Record, p. 327. The defendant introduced no psychiatric evidence.

TORTS—RELEASE—LAW OF THE SITUS OF THE TORT DETERMINES EFFECT OF A RELEASE.—The defendant in a negligence action moved to dismiss¹ based on the defense of a general release, given by plaintiff to a joint tort-feasor not a party to the action. Defendant contended that, since the tort arose in Virginia, the laws of that state controlled. Under Virginia law the general release is considered absolute despite its reservation of plaintiff's rights against defendant. Plaintiff maintained that the release, which was executed in New York, was a covenant independent of the tort, affecting only the remedy, and should therefore be governed by the law of the forum.² In granting defendant's motion, the Court *held* that the release was substantive in nature since it effectively prevented the cause of action from being enforced. *De Bono v. Bittner*, 178 N.Y.S.2d 419 (Sup. Ct. 1958).

At common law a release of one tort-feasor discharged all who participated in the tort.³ It was reasoned that an injured party should be allowed but one satisfaction for his claim. Since each joint tort-feasor is considered to sanction the acts of the other, making them his own, each becomes liable for the entire damage. Therefore, a release or discharge of one joint tort-feasor extinguishes the entire claim, leaving nothing for which the other can be held liable.⁴ The New York courts escaped the harshness of the common-law rule by holding that when a reservation of rights is contained in a written release, the release must be treated as a covenant not to sue.⁵ Other jurisdictions resorted to various devices so that presently only a few hold it is still impossible to settle with one tort-feasor without releasing the other.⁶

¹ N.Y. R. CIV. PRAC. 106.

² See GOODRICH, CONFLICT OF LAWS 227 (3d ed. 1949).

³ *Cocke v. Jennor*, Hob. 66, 80 Eng. Rep. 214 (K.B. 1614).

⁴ *Roper v. Florida Pub. Util. Co.*, 131 Fla. 709, 179 So. 904 (1938).

⁵ In New York, the release of one joint tort-feasor for consideration, with a reservation of rights against the other joint tort-feasors, is considered a covenant not to sue the tort-feasor so released, and does not operate to release the others. However, in an action against the latter there is presented a question of fact as to whether the amount received by the plaintiff in settlement is payment in full for his injuries. If the facts disclose that the amount so received fully compensates the injured party there can be no further recovery, but if the amount received does not fully compensate him he may recover against the remaining joint tort-feasors for full damages, the amount of the settlement being credited against the amount of the judgment. See N.Y. DEBT. & CRED. LAW §§ 231-35; *Gilbert v. Finch*, 173 N.Y. 455, 66 N.E. 133 (1903); *Fox v. Western N.Y. Motor Lines*, 232 App. Div. 308, 249 N.Y. Supp. 623 (4th Dep't 1931), *res'd on other grounds*, 257 N.Y. 305, 178 N.E. 289 (1931).

⁶ See PROSSER, TORTS 244 (2d ed. 1955). A covenant not to sue is treated as a general release in Pennsylvania and Virginia. See *Smith v. Roydhouse, Arey & Co.*, 244 Pa. 474, 90 Atl. 919 (1914); *Shortt v. Hudson Supply & Equip. Co.*, 191 Va. 306, 60 S.E.2d 900 (1950). Washington, which had formerly rejected the covenant not to sue in *Rust v. Schlaitzer*, 175 Wash. 331, 27 P.2d 571 (1933), and *Haney v. Cheatham*, 8 Wash. 2d 310, 111 P.2d

A covenant not to sue does not discharge the cause of action, but is merely an agreement not to enforce it against the covenantee.⁷ Thus, a covenant with one tort-feasor does not bar an action against another jointly and severally liable, although the amount paid by the covenantee will be taken into account in such an action.⁸ In order to prevent circuity of action, the covenant not to sue may be pleaded as a *défense*.⁹

The instant case raises the problem as to the effect that should be given to a release in New York, which recognizes covenants not to sue, if the tort arose in a jurisdiction which holds that a covenant not to sue one joint tort-feasor operates to prevent a recovery against any other tort-feasor who participated in the same breach of duty.

The leading cases have treated the question along well-settled principles of conflict of laws.¹⁰ An extensive discussion is found in *Goldstein v. Gilbert*,¹¹ where the precise situation presented in the instant case was before the court in West Virginia.¹² The court stated:

We think it is well settled that the plaintiff's right of substantive recovery is the law, both prospective and retroactive, of the sovereignty of the place that the accident took place. Its birth and continued existence depend upon that law, and, if that be true, it would seem to follow logically that the legal effect of any conduct which might or might not terminate that existence would necessarily be weighed in accordance with the same law.¹³

This reasoning was adopted in *Preine v. Freeman*,¹⁴ which reached the conclusion that the laws of the state which gave the plaintiff the cause of action also control in determining the effect of the release, regardless of where the release was executed. Again, in *Lindsay v.*

1003 (1941), appears to have impliedly accepted it in *Richardson v. Pacific Power & Light Co.*, 11 Wash. 2d 288, 118 P.2d 985 (1941).

⁷ *Kansas City So. Ry. v. McDaniel*, 131 F.2d 89 (8th Cir. 1942).

⁸ *Southern Pac. Co. v. Raish*, 205 F.2d 389, 393 (9th Cir. 1953); *McKenna v. Austin*, 134 F.2d 659 (D.C. Cir. 1943). See note 5 *supra*.

⁹ *Karcher v. Burbank*, 303 Mass. 303, 21 N.E.2d 542 (1939).

¹⁰ It is a general rule that the *lex loci delicti* governs the right of an injured party to sue in tort, the liability of the tort-feasor, and the defenses he may plead. The liability to pay damages for a wrong may, after it has come into existence, be discharged or modified by the law of the state which created it. See 2 BEALE, *CONFLICT OF LAWS* § 389.1 (1935); GOODRICH, *CONFLICT OF LAWS* § 92 (3d ed. 1949); MINOR, *CONFLICT OF LAWS* § 196 (1901).

¹¹ 125 W. Va. 250, 23 S.E.2d 606 (1942).

¹² In West Virginia, releases in tort actions are governed by statute. "A release to, or an accord and satisfaction with, one or more joint trespassers, or tortfeasors, shall not inure to the benefit of another such trespasser, or tortfeasor, and shall be no bar to an action or suit against such other joint trespasser, or tortfeasor, for the same cause of action to which the release or accord and satisfaction relates." W. VA. CODE ANN. § 5481 (1955).

¹³ *Goldstein v. Gilbert*, 125 W. Va. 250, 23 S.E.2d 606, 608 (1942).

¹⁴ 112 F. Supp. 257 (E.D. Va. 1953).

Chicago, B. & Q.R.R.,¹⁵ speaking of a release, the court said, "its validity as a defense in an action in tort is governed by the law of the place of injury."¹⁶ Similarly, the Supreme Court of New Jersey held that the effect of a release in tort is ". . . properly determined by the law controlling the discharge of the obligation sought to be released."¹⁷

In the principal case, plaintiff, in an attempt to avoid application of the Virginia law, contended that the instrument was separate and distinct from the tort, affecting only the remedy. The courts have rejected this theory, holding that the ". . . contract is by its terms tied to the tort, and the same law should be applied to the one as to the other"¹⁸ and that ". . . a right without [a] remedy is hardly a working hypothesis."¹⁹ In the *Goldstein* case, the court conceded that a covenant not to sue seems only to affect the remedy, but felt bound to follow the law of Virginia.²⁰

It would appear that the initial position taken by New York is perfectly consistent with that taken in other jurisdictions. No other position is tenable if the law of the situs of the tort is to govern both the creation and the extent of the tort-feasor's liability. Injured persons and their counsel must heed the New York interpretation when confronted with causes of action that arose in Pennsylvania or Virginia, else they may, by covenanting not to sue one of several joint tort-feasors, inadvertently settle a claim for less than its proper value.

¹⁵ 226 Fed. 23 (7th Cir. 1915), *cert. denied*, 241 U.S. 678 (1916).

¹⁶ *Id.* at 26.

¹⁷ *Daily v. Somberg*, 49 N.J. Super. 469, 140 A.2d 429, 432 (1958). The court said: "The law that creates the right determines what items of loss are to be included in the damages. Since the right to damages is created by the law of Ohio, it is measured by that law. . . . The law of Ohio controls not only in ascertaining the damages that proximately resulted from the injury sustained there, but also in determining the legal effect of the instrument releasing plaintiff's claim for such damages." *Ibid.*

¹⁸ *Smith v. Atchison, T. & S.F. Ry.*, 194 Fed. 79, 81 (8th Cir. 1912).

¹⁹ *McKenna v. Austin*, 134 F.2d 659, 661 (D.C. Cir. 1943). The plaintiff urged that the instrument in question was not a release from substantive liability but was merely a covenant not to sue. In refusing to accept the distinction the court said: "When one surrenders all means of enforcing his claim against another and does this in settlement of a dispute and threatened litigation, he effectually extinguishes the underlying right. Thereafter, if it is right at all, it is right without remedy. . . . [T]he idea of right without remedy is hardly a working hypothesis. Every day law is predicated upon the courts' capacity to do something about disputes. When one wholly surrenders his recourse to the courts in such matters he insulates his adversary against his claim as effectually as when in so many words he releases him." *Ibid.*

²⁰ "There is no question but that under most of the cases involving the distinction, the difference has been upheld with the result that while its [the covenant not to sue] practical effect is to bar the signer's right of recovery, it can still be said that the contract itself relates only to the remedy." *Goldstein v. Gilbert*, 125 W. Va. 250, 23 S.E.2d 606, 608 (1942).

WILLS—INCORPORATION BY REFERENCE—INCORPORATION OF AN IMMATERIALLY AMENDED TRUST ALLOWED.—Testator made a bequest to the trustees of an amendable trust. Subsequently, the trust was amended twice. The bequest was attacked as being in violation of the rule against incorporation by reference. In unanimously affirming the decisions of the Surrogate and the Appellate Division, the Court of Appeals *held* that a bequest, referring to a trust in which minor administrative changes had been made subsequent to the execution of the will, did not offend the rule. *In re Ivié's Will*, 4 N.Y.2d 178, 149 N.E.2d 725, 173 N.Y.S.2d 293 (1958).

A devise or bequest is ordinarily invalid unless it is in writing, subscribed and attested in the manner provided by statute.¹ The doctrine of incorporation by reference, recognized in England² and in many states,³ allows an instrument, whether or not it meets these requirements, to be incorporated into a will merely by making reference to it.⁴ However, the testator's intent to incorporate must be certain⁵ and the instrument must be in existence at the time the will is executed.⁶ It must also be precisely and adequately defined therein.⁷ Because of the danger of fraud⁸ and circumvention of the statute of wills,⁹ courts employ extreme care in their application of the doctrine.

¹ See, *e.g.*, N.Y. DECED. EST. LAW § 21.

² See *Bizzey v. Flight*, [1876] 3 Ch. D. 269; *Allen v. Maddock*, 11 Moore P.C. 427, 14 Eng. Rep. 757 (1858).

³ See, *e.g.*, *Newhall v. Newhall*, 280 Ill. 199, 117 N.E. 476 (1917); *Shulsky v. Shulsky*, 98 Kan. 69, 157 Pac. 407 (1916); *Taft v. Stearns*, 234 Mass. 273, 125 N.E. 570 (1920).

⁴ See ATKINSON, WILLS 385-94 (2d ed. 1953); 1 SCOTT, TRUSTS § 54.1 (2d ed. 1956).

⁵ See *Matter of Piffard*, 111 N.Y. 410, 18 N.E. 718 (1888); *In re McCurdy's Estate*, 197 Cal. 276, 240 Pac. 498 (1925).

⁶ See *Estate of Shillaber*, 74 Cal. 144, 15 Pac. 453 (1887); *Appeal of Sleeper*, 129 Me. 194, 151 Atl. 150 (1930) (dictum).

⁷ See *Thayer v. Wellington*, 91 Mass. (9 Allen) 283 (1864); *Sheldon v. Sheldon*, 1 Rob. Ecc. 82, 163 Eng. Rep. 972 (1844). For a general discussion of the conditions in relation to trusts, see 1 SCOTT, TRUSTS § 54.1 (2d ed. 1956). See also 1 PAGE, WILLS § 242 (lifetime ed. 1901) for a discussion of the distinction between incorporation by reference and the doctrine that a will may be written on separate pieces of paper.

⁸ "Obviously an unrestricted recognition of incorporation of unattested papers into wills would open the door to fraud and in addition may be said to violate the spirit of the requirements of execution." ATKINSON, WILLS 386 (2d ed. 1953). However, even without the aid of the doctrine, courts go outside the will. See, *e.g.*, *Dennis v. Holsopple*, 148 Ind. 297, 47 N.E. 631 (1897), allowing a bequest to persons who might have nursed and clothed testator when he was in need; *Metcalf v. Sweeney*, 17 R.I. 213, 21 Atl. 364 (1891), determining whether plaintiff was within a bequest to servants in testator's employ at his death. Similarly an invalid will may be incorporated by a subsequently executed valid will, although New York limits this doctrine largely to cases in which the original will was invalid for reason of lack of testamentary capacity. *In re Brown's Estate*, 6 M.2d 803, 160 N.Y.S.2d 761 (Surr. Ct. 1957).

⁹ See *Hatheway v. Smith*, 79 Conn. 506, 65 Atl. 1058 (1907); *Philps v.*

In New York, when the instrument itself meets the statutory requirements it may properly be incorporated.¹⁰ The courts will also go outside the will merely to explain a term in the will.¹¹ In at least one case the court went outside the will to determine the amount of the bequest.¹² This would appear to be a recognition of the doctrine of "independent significance." Although it is said that the doctrine of incorporation by reference is not recognized,¹³ non-recognition will not be carried to a "drily logical extreme."¹⁴ Apparently the courts will sometimes¹⁵ allow incorporation if by so doing the obvious intent of the testator will be effected. *Matter of Rausch*¹⁶ established that an unamendable trust may be incorporated by reference.¹⁷ The ultimate basis for that decision is not clear. In the opinion, Judge Cardozo stated:

Here the extrinsic fact, identifying and explaining the gift already made, is as impersonal and enduring as the inscription on a monument. . . .

A father bequeaths a legacy to his son by cancelling whatever indebtedness appears upon his books. No one doubts the validity of such a gift. . . . Yet to understand the extent of the legacy we must go beyond the will itself. "Signs and symbols" must be turned "into their equivalent realities. . . ."¹⁸

This language appears to approximate the "independent significance" doctrine. The opinion goes on to state that "the rule against incorporation is not a doctrinaire demand for an unattainable perfection."¹⁹ It would appear that the doctrine of incorporation by reference or that of "independent significance" could support the decision.

Robbins, 40 Conn. 250, 271-72 (1873); Note, 17 MINN. L. REV. 527, 533-38 (1933); 12 MINN. L. REV. 769, 770 (1928); ATKINSON, WILLS 386 (2d ed. 1953).

¹⁰ The most common example of this is the incorporation by reference of another's will. See *Matter of Fowles*, 222 N.Y. 222, 118 N.E. 611 (1918).

¹¹ See *In re Latz' Estate*, 95 N.Y.S.2d 584 (Surr. Ct. 1950); *In re Utter's Will*, 173 Misc. 1069, 20 N.Y.S.2d 457 (Surr. Ct. 1940).

¹² *Langdon v. Astor's Executors*, 16 N.Y. 9 (1857).

¹³ See DAVID, N.Y. LAW OF WILLS § 436 (1923). "The New York law is well established that documents or instruments which have not been executed in accordance with the requirements of section 21 of the Decedent Estate Law cannot be incorporated in a will by reference." *In re Snyder's Will*, 125 N.Y.S.2d 459, 460 (Surr. Ct. 1953). For an earlier case in New York, see *Booth v. Baptist Church*, 126 N.Y. 215, 28 N.E. 238 (1891). *But see Caulfield v. Sullivan*, 85 N.Y. 153 (1881); *Brown v. Clark*, 77 N.Y. 369 (1879).

¹⁴ *Matter of Rausch*, 258 N.Y. 327, 331, 179 N.E. 755, 756 (1932). Mr. Justice Holmes originated the phrase in *Noble State Bank v. Haskell*, 219 U.S. 104, 110 (1911).

¹⁵ See notes 5, 6 & 7 *supra* and accompanying text.

¹⁶ 258 N.Y. 327, 179 N.E. 755 (1932).

¹⁷ Although this is accepted as the holding of the case, nowhere in the opinion does Judge Cardozo mention that the trust is unamendable. However, that it is unamendable is shown in *President & Directors of the Manhattan Co. v. Janowitz*, 260 App. Div. 174, 21 N.Y.S.2d 232 (2d Dep't 1940), and *In re Snyder's Will*, 125 N.Y.S.2d 459 (Surr. Ct. 1953).

¹⁸ *Matter of Rausch*, 258 N.Y. 327, 332, 179 N.E. 755, 756 (1932).

¹⁹ *Id.* at 332, 179 N.E. at 757.

In the subsequent case of *President and Directors of the Manhattan Co. v. Janowitz*,²⁰ a bequest to a trust which had been substantially amended subsequent to the execution of the will was not allowed. The court stated that the substantial change by amendment eliminated all independent significance. However, despite amendment, it would seem that the trust still had independent significance,²¹ and therefore, if the underlying concept of the *Rausch* case was "independent significance," the *Janowitz* case would be difficult to reconcile. Subsequently, *Janowitz* was refined by *In re Snyder's Will*,²² where a bequest was allowed to an amendable trust which actually had not been amended after execution of the will. Once again, the conclusion can be sustained under either doctrine.

In extending the *Snyder* case, the principal case affirms it. Since the amendment was found immaterial, it is not within *Janowitz's* rule. The Court of Appeals, however, would also seem to have tacitly accepted *Janowitz*, since the principal case could have been more easily decided if the Court had chosen to overrule it. Thus, in New York today, a trust that is unamendable, or one that is amendable but in fact has not subsequently been amended, may be incorporated. One which is subsequently substantially amended may not be; one that is immaterially changed may be. Just where the line is to be drawn is left unanswered.

No valid reason seems to exist for these distinctions. The reasons for upholding incorporation in one case uphold it in all. If the intent of the testator is certain and the possibility of fraud is eliminated, the incorporation of all formal trust instruments should be allowed. Certainly with the solemnity surrounding this type of trust there is virtually no chance of fraud. As Judge Cardozo indicated, little difference exists between leaving money to a trustee who is bound by the trust agreement, and leaving money to a corporation which is bound by its corporate charter. Yet one would hardly doubt the validity of a bequest to a corporation, although a corporation may subsequently have its corporate charter amended.²³

²⁰ 260 App. Div. 174, 21 N.Y.S.2d 232 (2d Dep't 1940).

²¹ This situation seems analogous to a bequest to employees at death. There the bequest is allowed despite the fact that the identity of the employees might have changed between the making of the will and the death of the testator. See *Dennis v. Holsopple*, 148 Ind. 297, 47 N.E. 631 (1897). Likewise a gift to a corporation will be allowed although its charter may be substantially changed. See *Matter of Rausch*, 258 N.Y. 327, 331, 179 N.E. 755, 756 (1932) (dictum).

²² 125 N.Y.S.2d 459 (Surr. Ct. 1953).

²³ In both instances there is legal obligation to use the money according to either the trust agreement or the corporate charter. See *Matter of Rausch*, 258 N.Y. 327, 331, 179 N.E. 755, 756 (1932). For general discussions of the *Rausch* case, see Notes, 17 MINN. L. REV. 527 (1933), 6 U. CINN. L. REV. 295 (1932); 9 N.Y.U.L.Q. REV. 507 (1932); 7 NOTRE DAME LAW. 541 (1932).